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Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1995

Pete Wilson, Governor of the State of California; et al.,
Petitioners,

vs.

Voting Rights Coalition; et al.,
Respondents,

Pete Wilson, Governor of California; State of California,
Petitioners,

vs.

Janet Reno, U.S. Attorney General; United States of America,
Respondents.

**On Petition For A Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit**

BRIEF OF AMICUS CURIAE SHERIFF JAY PRINTZ IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 37, Sheriff Jay Printz submits this brief *amicus curiae* in support of the petition for certiorari filed by California Governor Pete Wilson in the above-entitled matter. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

I. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae Jay Printz is the duly elected Sheriff of Ravalli County, Montana and a named Appellant/Cross-Appellee in *Mack, Printz v. United States*, 66 F.3d 1025 (9th Cir.1995)(petition for rehearing with suggestion for rehearing *en banc* filed October 19, 1995).[1] *Amicus* is, at present, challenging the validity of the Brady Handgun Violence Protection Act, Pub.L. No. 103-159, § 102, 107 Stat. 1536 (1993) ("Brady Act") under the Tenth Amendment to the United States Constitution because the Brady Act has imposed mandatory federal duties upon state officials in order to implement a program with its genesis in an act of Congress. In his challenge to the Brady Act, *amicus* argues that as a state official, he has been commandeered by the federal government in violation of this Court's

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[1] *Jay Printz, Sheriff/Coroner, Ravalli County, Montana v. United States of America*, Nos. 94-36193, 95-35037 (on appeal from the United States District Court for the District of Montana--Missoula Division, No. CV-94-35-CCL). The appeal of Sheriff Printz was consolidated in the Ninth Circuit with that of *Richard Mack, Sheriff of Graham County, Arizona, v. United States of America*, Nos. 94-16940, 94-17002 (on appeal from the United States District Court for the District of Arizona, D.C.No. CV-94-00113-JMR). The petition for certiorari refers to the consolidated appeals as *"Mack,"* and that form will remain consistent here.

pronouncement in *New York v. United States*, 112 S.Ct. 2408 (1992).

Likewise, California's petition for certiorari in the instant proceeding, challenging the constitutionality of the National Voter Registration Act ("NVRA" or the "Motor Voter" Act) asks the Court to resolve important issues about the power of the federal government to conscript state officials to administer a federal program. Accordingly, *amicus* has a keen interest in this case. The presently-pending Ninth Circuit case brought by Sheriff Printz and Sheriff Mack, in addition to several other pending challenges to the Brady Act brought by his colleagues,[2] will be directly impacted should this Court grant certiorari and decide the questions presented in this matter.

As with the petitioner here, Sheriff Printz has relied on *New York v. United States* in an attempt to fend off interference with the execution of his official state duties. *Amicus* believes the Court should grant certiorari in this case to clarify questions of exceptional importance, specifically: 1) the extent to which Congress may conscript state employees to assume federal duties and administer a federal program; and 2) the reach of this Court's ruling in *New York v. United States*, that the Federal Government may not compel the States to enact or administer a Federal program (upon which *amicus* as well as petitioners in this case have

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[2] *See Romero v. United States*, 883 F.Supp 1076 (W.D.La.1995); *Frank v. United States*, 860 F.Supp. 1030 (D.Vt.1994); *McGee v. United States*, 863 F.Supp. 321 (S.D.1994); *Koog v. United States*, 852 F.Supp. 1376 (W.D.Tex.1994). The cases brought by Sheriffs McGee and Koog are on appeal to the Fifth Circuit and were argued June 7, 1995.

relied).

II. SUMMARY OF ARGUMENT

New York v. United States, 112 S.Ct. 2408 (1992), held that Congress may not compel the States to enact or administer a federal regulatory program, even where Congress has been granted the power to legislate over that subject matter. Congress is delegated specifically enumerated rights under Article I of the Constitution, and all powers not so delegated are reserved to the States or to the people respectively under the Tenth Amendment.

The National Voter Registration Act is one of several recent Congressional enactments, such as the Brady Act, which conscripts State or local officials and employees to administer federal programs. The Brady Act requires local law enforcement officers to administer a portion of the federal Gun Control Act.

These enactments are beyond the scope of the powers delegated by Article I and violate the residual sovereignty of the States reserved under the Tenth Amendment. This Court should grant certiorari in order to exposit and explain further the limits of federal power as previously set forth in *New York v. United States.*

III. REASONS FOR GRANTING THE PETITION

A. Certiorari Should Be Granted to Define Further the Contours of Power Reserved to the States Under the Tenth Amendment and Resolve the Important Question of Whether the Constitution Permits the Federal Government to Commandeer State Employees to Administer a Federal Program

The statutory framework of the Brady Act and the NVRA are strikingly similar. First, each Act conscripts one or more state officials to become the responsible parties for executing the federal commands. In the case of the Brady Act, it is the chief law enforcement officer ("CLEO") who must ascertain whether receipt or possession of a handgun is in violation of law, 18 U.S.C. § 922(s)(2). Under the NVRA, each state is commanded to designate a "State officer or employee as the chief State election official [("CSEO")] to be responsible for coordination of State responsibilities under this Act." 42 U.S.C. § 1973gg-8. Second, each chief official is required to utilize federally-prescribed forms by which to discharge the new duties commanded of them.[3]

In *New York v. United States*, this Court established without qualification that "States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government." *New York*, 112 S.Ct. 2408, 2434 (1992). In the case of the Motor Voter Law, Congress has conscripted states agencies, whose duties were unrelated to elections, as administrative agencies of the federal government to administer a federal registration program. In *amicus*'s case challenging the Brady Act, Congress has

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[3] In the case of a CLEO under the Brady Act, the form must contain certain information that the handgun transferee is not in violation of federal law by possessing a handgun. 18 U.S.C. § 922(s)(3)(B). Likewise, under the NVRA, the CSEO must make available forms that include statutorily-prescribed verbiage that informs the prospective registrant that "IF YOU DO NOT CHECK EITHER BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED NOT TO REGISTER TO VOTE AT THIS TIME." 42 U.S.C. § 1973gg-5(a)(6)(B).

required chief law enforcement officers created by State law to administer federal background checks for handgun transferees.

Yet, in passing on the Tenth Amendment challenge by Sheriff Printz to the Brady Act, the Ninth Circuit in *Mack* shrugged off this commandeering and noted in passing that

> there is likely to be *some point* at which a federal statute that enlists the aid of state employees can become so burdensome to the State that it violates the Tenth Amendment. Surely the federal government cannot stall the state government in its tracks by imposing all-consuming federal duties on the State's employees. We conclude, however, that the Brady Act does not approach that point. [Sheriff] Printz [has] not demonstrated that the Act will *interfere unduly* with [his] duties.

Mack, 66 F.3d at 1032 (emphasis supplied). In the Ninth Circuit's view, the federal government does not unduly interfere with state sovereignty until it shuts it down. Yet, the Ninth Circuit never illuminated the "point" at which "undue interference" blossoms into a viable claim under the Tenth Amendment -- an amorphous standard that hardly serves the federal-state balance established by the Constitution. It merely held that the Federal Brady Act may compel local officials to administer a federal program, despite this Court's clear directive that "[t]he federal government may not compel the States to enact or administer a federal regulatory program," *New York*, 112 S.Ct. 2408,

2435 (1992).

Indeed, the Ninth Circuit has taken a very narrow view of *New York*: that the case *"is best read"* as holding that "the federal government is not entitled to coerce the States into legislating or regulating according to the dictates of the federal government," *Mack*, 66 F.3d at 1030 (emphasis supplied). The Ninth Circuit opined that this Court must have meant in *New York* that the protection of the Tenth Amendment is only afforded state officials compelled to administer *"in the sense* of being in charge of a program and making policy decisions with respect to the program." *Id.* at 1031 n. 7 (emphasis supplied). Accordingly, the Ninth Circuit has taken the position that, unless a policy-making state official is compelled to enact laws or promulgate regulations in accordance with federal standards, the federal government is free to enact laws which utilize state officials as federal administrators - regardless of the scope of state officials' existing job duties, or their resources to perform those duties. According to the Ninth Circuit, Sheriff Printz does not "administer" a "program," and thus *New York* is to be distinguished from his case.

The Ninth Circuit's narrow reading of *New York* highlights the urgency for this Court to settle earlier, rather than later, whether the federal government may commandeer state employees. If so, in an era of tight federal budgets, Congress will have found a new set of employees -- state officials -- on its organization chart for purposes of administering federal programs for which Congress appropriates no funding.

B. Certiorari Should be Granted to Clarify Whether the Conscription Doctrine of *New York* is Limited to Intrusion Into State Affairs by Federal Programs Justified under the Commerce Clause

This Court recognized in *New York* that, respecting whether a power is granted to Congress in Article I or whether it is reserved to the States by the Tenth Amendment, "the two inquiries are mirror images of each other." 112 S.Ct. 2408, 2417 (1992). This Court described its mission in *New York* as no less than a determination of "whether an incident of state sovereignty is protected by a limitation on an Article I power." *Id.* at 2418.

Notwithstanding the expanse of this horizon, the Ninth Circuit, in response to California's challenge to the Motor Voter Law, narrowly characterized *New York* as holding that "Congress could not impose on the states the burden of exercising its power under the Constitution to regulate *interstate commerce*," *Voting Rights Coalition* v. *Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995) (emphasis supplied). The court thereby rendered the invigoration of the Tenth Amendment in *New York* entirely impotent to protect state sovereignty from infringement from a federal statutory scheme premised on Article I, section 4. According to the Ninth Circuit, the Tenth Amendment interest asserted by California does no more than act as a feeble, unenforceable request that the Federal Government's conscription of state employees be "done sensitively." *Id.* at 1416.

An important question presented by this petition is whether courts may be permitted to portray *New York* in so limited a fashion. The holding below is that *New York*'s

pledge that "the Constitution simply does not give Congress the authority to require the States to regulate," *New York*, 112 S.Ct. 2408, 2429 (1992), is limited to the Commerce Clause and does not extend to Article I, section 4. However, *New York* offered no such explicit contingencies on state sovereignty hinging on the Tenth Amendment.[4]

Moreover, the Ninth Circuit in *Mack* took another approach to further narrow *New York's* holding. Since it was not in a position to avoid *New York's* ruling on the ground that it was a Commerce Clause case, the Ninth Circuit held that federal conscription of state officials passes constitutional muster under the Tenth Amendment if the newly imposed duties are not "alien" to the official's "usual" line of work, and represent a "minimal" interference with state functions. 66 F.3d at 1031. The justification for this novel "minimal-interference" test is presumably Congress's expansive power under the Commerce Clause. But the Motor Voter Act would be a violation of the Tenth Amendment under the Ninth Circuit's reasoning in *Mack* because voter registration duties have never been the province of the California Department of Motor Vehicles and are thus "alien" to the agency's usual line of work, namely

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[4] Indeed, this Court pointed out in *New York* that the interests asserted by a state under the Tenth Amendment must still be weighed against three seemingly-insatiable conferred powers on the Federal Government, specifically the Commerce Clause under Article I, section 8, clause 3; the Spending Clause under Article I, section 8, clause 1; and the Supremacy Clause under Article VI, clause 2. *New York v. U.S.* at 112 S.Ct. 2408, 2419 (1992). Such calibration is required because "[t]he actual scope of the Federal Government's authority with respect to the states has changed over the years ... but the constitutional structure underlying and limiting that authority has not." *Id*

vehicle and driver licensing.

If *Mack* is a proper transmutation of this Court's decision in *New York*, then "the conscription of state employees in the present case goes well beyond the circumstances in the Brady Act. ... Here, ... employees of the [California] State Department of Motor Vehicles and state public assistance agencies are being commandeered to perform federal registration duties wholly outside their 'usual line of work' and to administer Motor Voter's registration program on state time." Petition for Certiorari at 22.

Like the petitioner, *amicus* does not argue in his pending Brady Act challenge that the Federal Government is completely powerless to regulate the subject of the federal statutory scheme. The objection to the federal impairment of state duties lies in the attempt by Congress to circumvent its obligation to directly regulate and administer a program. The Ninth Circuit has failed in this and other instances to accord any weight whatsoever to the "core of sovereignty retained by the States under the Tenth Amendment," 112 at S.Ct. 2408, 2419 (1992), as required by *New York*. On this basis, the petition for certiorari should be granted.

IV. CONCLUSION

Based on the foregoing, a*micus curiae* Sheriff Jay Printz respectfully requests that the petition for certiorari in this matter be granted.

Dated December 22nd, 1995

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